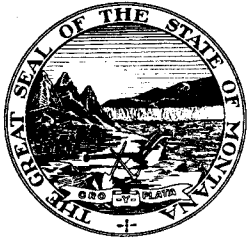


DEPARTMENT OF
PUBLIC HEALTH AND HUMAN SERVICES



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February 6, 2007

Representative Ron Stoker
Chairman
Human Services Subcommittee

Dear Chairman Stoker:

In response to the issues and questions that surfaced during the discussion of HB 386, the Public Assistance Bureau offers the following information. Much of this is applicable to Mr. Henning's current situation in terms of where problems were encountered and what solutions are available to him.

How the life estate issues are considered in the determination of Medicaid eligibility:

1. The most important issue is that the life estate owners be forthcoming with the agency about the presence of the life estate. This allows the agency and the applicant to have a useful exchange of information from the beginning. Life estate rights are often misunderstood by remainder owners.
2. Life estates are excluded as resources when the life estate owners are using their non-home life estate property to generate the 6% annual income. The income is retained by the rightful owner of the life estate. The rightful owner of the life estate is entitled to the income from the property. Problems can result if the income from the life estate is being redirected to other family members (usually the remainder owners of the property) or waived altogether.
3. The income from the life estate should then be used to meet some of the life estate owner's needs, such as payment of medical (including nursing home) expenses, rather than allowed to accumulate as a resource. Adding and keeping the income in a savings or checking account may cause the individual to exceed resource limits and lose eligibility for that reason, rather than due to the life estate itself. Use of the money in the account by others for their benefit is an asset transfer.
4. In the event the life estate is not otherwise exempt (home, etc.) and the life estate is not generating income to the life estate owner of at least 6% net annually, an available option is that the remainder owners of the property may and often do supplement the life estate income so that it does meet the 6% net

annual income threshold, thereby causing the life estate to be excluded and not considered in the eligibility determination.

5. Another option for a life estate that is not generating 6% net annual income is for the remainder owners to purchase the life estate interest from the life estate owner for fair market value. This allows the remainder owners to obtain full and immediate ownership and possession to the property, and removes the life estate from consideration in the eligibility determination. This is sometimes chosen because the remainder interest was often a gift to the remainder owners from the life estate owner in the first place.
6. Listing the life estate for sale is a last resort, often reserved for property that the life estate owner refuses to use to generate income or in cases where the life estate owner is allowing the income to be redirected to third parties. By policy in the Code of Federal Regulations, the proof of reasonable efforts to sell is quite specific. Although we agree they make the most sense when applied to real estate, the State has no choice but to apply the policy to life estates.

Problems result when:

- A. A life estate is not reported to the agency and is later discovered after eligibility has been incorrectly granted. Applicants and their families often state they were told by some disinterested, unrelated third party who may be unschooled in Montana Medicaid eligibility policy (such as an accountant or a lawyer, either in or out of Montana) not to report the situation. However, life estates are clearly listed as reportable assets on the Medicaid application forms, which are to be signed under penalty of perjury.
- B. The life estate rights have been misunderstood and the remainder owners have sold the property with the belief that the sale of the property "cancels" the life estate but do not compensate the life estate owner for the sale of their property rights.
- C. The life estate rights are on a home and the parties believe the life estate is simply a right to occupy instead of a right to full possession and use during one's lifetime. Often, when the life estate owner moves out, the remainder owner moves in and does not pay rent.
- D. The life estate is on a family farm/ranch and the remainder owners or other relatives are farming/ranching the property free of lease or rental obligations. In these cases, if the property were being used by non-relatives there would be lease arrangements and lease payments being made to the property owners, but because of the relationship, there is no lease agreement and no lease payments made. (This also constitutes an uncompensated transfer of a stream of income.)

Mr. Henning specifically has exercised the options described in #6 above to resolve the life estate issues, although he also could have also utilized options 2, 4, or 5 in the first list. As soon as the money in an account that includes income from the life estate and determined to be a constructive trust has been accounted for, an eligibility decision should be possible. He may help move his mother's eligibility determination along at this point by providing documentation of all deposits and withdrawals from the account he held in constructive trust for his mother.

In closing, the Department would like to stress that current policy surrounding life estates does provide eligibility determination exclusions in multiple circumstances while preserving the intent and philosophy of asking recipients to share in the cost of their

care whenever possible. We would ask that the policy stand as is and offer improved information sharing measures to inform applicants of the options open to them.

In addition, should the Committee decide to pursue the intent of HB 386, it should be pointed out that as written it is misplaced in Section 53-6-131(1)(e), MCA, and may have unintended consequences. Subsection (1)(e) discusses income requirements for Medicaid, while the intent of the bill apparently is to provide that life estates will not be counted as an asset (resource). This language does not make sense in the context of subsection (1)(e) and does not accomplish the purpose of creating an exclusion for life estates. It could be placed in subsection (2), which discusses income and resource limitations, although subsection (2) addresses dollar limits on resources rather than exclusions. The most appropriate place to put a provision requiring the exclusion of life estates might be in Section 53-6-113(6), which authorizes the Department to make rules governing Medicaid eligibility including the treatment of resources. In addition, a 1902 (r)(2) request would need to be made to the Centers for Medicare and Medicaid for approval of this exclusion.

We encourage the Committee to carefully consider their decision on HB 362.

Sincerely,

A handwritten signature in black ink, appearing to read "Hank Hudson", written in a cursive style.

Hank Hudson
Administrator

cc: Representative Rick Ripley
Joan Miles, Director